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1       **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2       **STATE OF NEW MEXICO,**

3             Plaintiff-Appellee,

4       v.

**NO. 35,766**

5       **LONZELL WIGGINS,**

6             Defendant-Appellant.

7       **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8       **Fred T. Van Soelen, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Bennett J. Baur, Chief Public Defender

13       Will O'Connell, Assistant Appellate Defender

14       Santa Fe, NM

15       for Appellant

16                                       **MEMORANDUM OPINION**

17       **VANZI, Chief Judge.**

18       {1}     Defendant appeals from the district court's judgment and sentence, convicting

19       him for criminal sexual penetration in the third degree and sentencing him to four

1 years for having committed a serious violent offense. Unpersuaded by Defendant's  
2 docketing statement that the district court erred, we issued a notice of proposed  
3 summary disposition, proposing to affirm. Defendant has responded with a  
4 memorandum in opposition to our notice. We have considered Defendant's response  
5 and remain unpersuaded. We, therefore, affirm.

6 {2} On appeal, Defendant argues that the district court erred by denying his motion  
7 to dismiss for violation of his right to a speedy trial, [DS 5; MIO 8-13] and Defendant  
8 challenges the sufficiency of the evidence to support his conviction. [DS 5; MIO 13-  
9 16] To avoid the unnecessary duplication of efforts, we do not rehash the entire  
10 speedy trial analysis and respond only to the arguments raised in Defendant's response  
11 to our notice.

12 {3} In his memorandum in opposition, Defendant contends that the case was  
13 intermediate, at best, and that the fifty-one months it took to bring him to trial was  
14 extraordinary and should weigh heavily in Defendant's favor. [MIO 9] The district  
15 court agreed with this sentiment and ruled that the delay was extraordinary and should  
16 weigh heavily in Defendant's favor. [RP 536-37, 546] Our notice agreed, as well. [CN  
17 3-4] Our notice proposed to hold, however, that the weight given to the length of  
18 delay was tempered by our assessment of the remaining factors. The New Mexico  
19 Supreme Court has held that, even though the length of delay colors the analysis of  
20 the other *Barker* factors, the length of delay is a separate and distinct inquiry, and no

1 single factor is determinative of a speedy trial violation. *See State v. Serros*, 2016-  
2 NMSC-008, ¶ 26, 366 P.3d 1121. We applied the analysis in *Serros* due to the cases’  
3 similarities in the length of delay and in the allegations that defense counsel played  
4 a part in the delay. [CN 3-4]

5 {4} In *Serros*, our Supreme Court affirmed dismissal for a speedy trial violation,  
6 based on the length and circumstances of the defendant’s pretrial incarceration, which  
7 resulted in extreme prejudice, and because the defendant did not cause or acquiesce  
8 in the delay. [CN 3-4] *Id.* ¶ 3. We contrasted the facts of *Serros* with those in  
9 Defendant’s case. We explained that Defendant deliberately caused some of the delay  
10 himself under the representation of two different defense attorneys, [RP 540, 544-45,  
11 547] waived time limits four times himself under the speedy trial analysis until the  
12 next trial setting was to occur, [RP 537-38, 547] and requested delay for allegedly  
13 serious discovery violations by the State that proved not to be violations at all. [RP  
14 545-46] It appeared to us that Defendant caused or acquiesced in the defense-caused  
15 delay. And most of the remaining delay seemed to have been caused by neutral  
16 reasons, not attributable to Defendant or the State, and some delay was caused by  
17 administrative reasons that weighed only slightly in Defendant’s favor. [RP 543-45]  
18 We explained that the State requested only one continuance about two-and-a-half  
19 years prior to trial, due to the victim’s lack of presence and relocation to Texas—the

1 only delay to which Defendant objected because he realized the victim was not  
2 available to testify against him at that time. [RP 540, 547]

3 {5} In *Serros*, the defense-caused delay occurred despite the defendant's repeated  
4 requests to hasten the process that went ignored by defense counsel, and because the  
5 State in *Serros* requested many postponements of trial and was found to have  
6 intentionally caused the delay. *See id.* ¶¶ 30-31, 44-75. [RP 547] Also significant to  
7 our Supreme Court in *Serros* was the defendant's oppressive pretrial incarceration in  
8 segregation for the duration of the delayed process, during which time the victim's age  
9 had doubled and the defendant was not ever permitted to interview the victim or his  
10 family. *See id.* ¶¶ 35-43, 84-93. In sharp contrast, Defendant in the current case was  
11 incarcerated for three months before his release on bond. [RP 547-48] Then,  
12 Defendant was reincarcerated for another month based on his arrest for a misdemeanor  
13 charge. [RP 548] Defendant showed no particularized prejudice or oppressive pretrial  
14 incarceration. [RP 548]

15 {6} In Defendant's response to our notice, he does not assert that the facts upon  
16 which we relied were wrong. Defendant responds that he should not be faulted for his  
17 attempts to obtain counsel that would advocate on his behalf and should not have to  
18 choose between the right to effective counsel and the right to a speedy trial. [MIO 11]  
19 Defendant has not established that his right to effective counsel was being violated by  
20 any particular action or inaction of counsel, however. Defendant also has not

1 established that his efforts for a speedy trial were thwarted by defense counsel or the  
2 State. Defendant asks that this Court afford more weight to the State’s obligation to  
3 move cases forward and to see that justice is done. [MIO 11] He asserts that the State  
4 contributed to the delay and is at least complicit in negligent delay. [Id.] Defendant  
5 does not otherwise dispute our characterization of the reasons for the delay, including  
6 the fact that the defense-caused delays were attributable to Defendant himself.

7 {7} With regard to Defendant’s assertion of the right to a speedy trial, Defendant  
8 states that his assertion was timely [MIO 11-12] but does not dispute that he objected  
9 to only one of the State’s continuances, which he pursued because he realized the  
10 victim was not available to testify against him at that time. [RP 540, 547] He also does  
11 not challenge the finding that Defendant waived time limits four times himself under  
12 the speedy trial analysis until the next trial setting was to occur.

13 {8} Lastly, relative to the prejudice Defendant suffered from the delay, he contends  
14 that the extraordinary delay in bringing the case to trial impaired his ability to mount  
15 a defense that calls witnesses who were present at the party where the crime was  
16 alleged to have occurred, because memories fade with time, generally. [MIO 12]  
17 Defendant does not establish that he showed particularized prejudice by the passage  
18 of time, however, which our case law requires. *See State v. Garza*, 2009-NMSC-038,  
19 ¶ 39, 146 N.M. 499, 212 P.3d 387 (holding that “generally a defendant must show

1 particularized prejudice of the kind against which the speedy trial right is intended to  
2 protect”).

3 {9} We are not persuaded that our notice improperly weighed and balanced the  
4 factors. We hold that because only the length of delay weighed heavily in Defendant’s  
5 favor, and that weight was tempered by the reasons for the delay, the weak assertion  
6 of the right, the intentional delays Defendant caused himself, his lack of pretrial  
7 incarceration for the bulk of the pretrial delay on the charge, and the lack of  
8 particularized prejudice, Defendant’s right to a speedy trial was not violated. *See*  
9 *Serros*, 2016-NMSC-008, ¶ 29 (“The reasons for a period of the delay may either  
10 heighten or temper the prejudice to the defendant caused by the length of the delay.”  
11 (internal quotation marks and citation omitted)); *Garza*, 2009-NMSC-038, ¶ 39  
12 (holding that although a defendant must show particularized prejudice, generally, “if  
13 the length of delay and the reasons for the delay weigh heavily in defendant’s favor  
14 and defendant has asserted his right and not acquiesced to the delay, then the  
15 defendant need not show prejudice for a court to conclude that the defendant’s right  
16 has been violated”).

17 {10} We affirm the district court’s denial of Defendant’s motion to dismiss for a  
18 speedy trial violation.

19 {11} Lastly, Defendant challenges the sufficiency of the evidence to support his  
20 conviction for criminal sexual penetration. [MIO 13-16] Defendant contends that if

1 this Court were to reweigh the conflicting evidence presented in this case, particularly  
2 the evidence that undermined the victim’s credibility, then there was reasonable doubt  
3 of Defendant’s guilt. [MIO 13-14] Defendant pursues this issue under the demands  
4 of *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982, and *State v.*  
5 *Boyer*, 1985-NMCA-029, ¶ 24, 103 N.M. 655, 712 P.2d 1. [MIO 14]

6 {12} As we stated in our notice, however, when reviewing for the sufficiency of the  
7 evidence, this Court “view[s] the evidence in the light most favorable to the guilty  
8 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence  
9 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,  
10 998 P.2d 176. We disregard all evidence and inferences that support a different result.  
11 *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. The jury is  
12 free to reject Defendant’s version of the facts and find that the credibility lies in the  
13 victim’s testimony. *See id.* On appeal, we will not reweigh the evidence, resolve any  
14 conflicts in the evidence, or indulge in inferences inconsistent with the verdict. *See*  
15 *State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that  
16 it is for the fact-finder to resolve any conflict in the testimony of the witnesses and to  
17 determine where the weight and credibility lie); *see also Rojo*, 1999-NMSC-001, ¶ 19  
18 (same). Viewing the evidence we set forth in our notice under the principles described  
19 above, we hold that the victim’s testimony constitutes substantial evidence of

1 unlawfulness and a lack of consent, and the evidence and inferences presented to the  
2 contrary do not render the evidence legally insufficient.

3 {13} Based on the foregoing, we affirm the district court's judgment and sentence.

4 {14} **IT IS SO ORDERED.**

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**LINDA M. VANZI, Chief Judge**

7 **I CONCUR:**

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**STEPHEN G. FRENCH, Judge**

10 **TIMOTHY L. GARCIA, Judge (specially concurring).**



1 **GARCIA, Judge (specially concurring).**

2 {15} I agree with the majority’s position affirming the district court’s judgment and  
3 sentence in this case. I write to specially concur because of the unique circumstance  
4 regarding Defendant’s speedy trial motion. A delay of fifty-one months is  
5 extraordinary and necessitates serious consideration by this Court.

6 {16} The unique circumstance in this case arises from the detail in the fourteen page  
7 decision letter issued by the district court. With the enormous caseloads that burden  
8 our trial courts, we recognize and appreciate the difficulty undertaken by the district  
9 court in preparing such a comprehensive and detailed letter ruling in a criminal case.

10 By doing so, the district court was able to carefully explain that, even where an  
11 extraordinary fifty-one month delay occurred, Defendant’s own actions were the  
12 primary cause for the delay. Defendant’s actions included, but were not limited to, his  
13 personal request for numerous delays or his acquiescence to nearly every delay that  
14 occurred in bringing his case to trial. *See State v. Estrada*, 2016-NMCA-066, ¶ 72,  
15 377 P.3d 476 (emphasizing the where the defendant interposed the majority of the  
16 delay and repeatedly requested continuances to delay trial, his speedy trial rights were  
17 not violated); *State v. O’Neal*, 2009-NMCA-020, ¶ 22, 145 N.M. 604, 203 P.3d 135  
18 (noting that the court could reasonably conclude that a defendant’s own actions  
19 showed “that [he] was either unconcerned about delay or expected to take advantage  
20 of the delay in which he had acquiesced”). The district court’s letter ruling was critical

1 in allowing this Court to summarily address Defendant's actions and how they led to  
2 the fifty-one month delay. We appreciate the district court's detailed ruling in this  
3 case.

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**TIMOTHY L. GARCIA, Judge**